

ESTTA Tracking number: **ESTTA291572**

Filing date: **06/24/2009**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91177192
Party	Defendant Martanna LLC
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Date	06/24/2009
Attachments	WASHINGTON-967626 - Opp. 91177192 Applicant Martannas Brief on the Case - 1.PDF (44 pages)(1296325 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

NAUTICA APPAREL, INC.,)	
)	
Opposer,)	Opposition No. 91177192
)	
v.)	Mark: GET NAUTI
)	
MARTANNA L.C.,)	Serial No. 78610037
)	
Applicant.)	Filed: April 15, 2005

APPLICANT'S BRIEF ON THE CASE

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APPLICANT'S BRIEF ON THE CASE

TO THE HONORABLE BOARD:

Applicant, Martanna, L.C. (hereinafter "Martanna"), through its undersigned attorneys, Saul Ewing, LLP, respectfully requests that the opposition filed by Nautica Apparel, Inc. (hereinafter "Opposer" or "Nautica") to Martanna's application Serial No. 78/610037 be dismissed for failure to demonstrate that registration of Martanna's mark, GET NAUTI, would result in either a likelihood of confusion or dilution with respect to Nautica's cited marks.

PROCEDURAL HISTORY

Nautica filed its Notice of Opposition on May 1, 2007. Martanna filed its answer on June 18, 2007, in which it also asserted certain defenses.

On June 21, 2007, Nautica filed a motion to strike certain portions of Martanna's answer and certain of Martanna's defenses. On September 20, 2007, the Board issued an order granting some portions of Nautica's motion to strike but denying other portions.

On March 20, 2008, Martanna filed a motion for summary judgment. On April 25, 2008, Nautica filed a countermotion for summary judgment. On September 12, 2008, the Board issued

an order denying both Martanna's motion and Nautica's countermotion. In that order, the Board found that genuine issues remain as to the respective meanings of the parties' marks, and that with respect to Opposer's dilution claim, "genuine issues remain, at least as to whether the parties' marks would be considered substantially identical."

On May 26, 2009, Opposer filed its Brief on the Case in this proceeding ("Nautica Case Brief").

EVIDENCE OF RECORD

A. Evidence of Record Introduced by Martanna

1. Martanna's First Notice of Reliance

This notice ("Martanna's First Notice of Reliance") introduced excerpts from MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, TENTH EDITION (1997), that included the entry for the word "get".

2. Martanna's Second Notice of Reliance

This notice ("Martanna's Second Notice of Reliance") introduced certain excerpts from the application file of a registration owned by Opposer and cited in Opposer's Notice of Opposition.

3. Martanna's Third Notice of Reliance

This notice ("Martanna's Third Notice of Reliance") introduced certain excerpts from printed publications downloaded and printed from Nexis consisting of articles that refer to a series of erotic fiction books by the author Lora Leigh with the titles NAUTI DREAMS, NAUTI NIGHTS and NAUTI BOY.

4. Exhibits introduced by counsel for Martanna during Nautica's testimony deposition of Margaret M. Bizzari:

A-1. The Notice of Opposition in this proceeding.

A-2. USPTO TARR abstracts for Nautica's Reg. No. 1802504 (NAUTEX) and Nautica's Reg. No. 2697078 (NAUTEX).

A-3. USPTO TARR abstract for Nautica's Reg. No. 3445949 (NAUTICARE).

A-4. USPTO TARR abstract for Nautica's Reg. No. 1613918 (NAUTICA and sail design).

A-5. Yahoo search results for "nauticare"; (2) Internet pages from shop.com with details on Nauticare boat-hull cleaner; (3) Yahoo search results for "nauticare nautica" (4) pages from the nautica.com website showing no results for searches for "nauticare" and "nauticakids", and a page from the nautica.com website showing a garment described as being "Designed with Nautex fleece".

B. Evidence of Record Introduced by Nautica

1. Transcript of testimony deposition of Nautica's in-house trademark paralegal, Margaret M. Bizzari ("Bizzari Transcript"), taken November 19, 2008.

2. Exhibits introduced by Nautica during testimony deposition of Margaret M. Bizzari:

- A. Notice of Deposition of Margaret Bizazari.
- B. U.S. Trademark registrations owned by Opposer.
- C. Excerpts from "product color boards/look books".
- D. Store photos and "store-within-a-store" photos displaying NAUTICA and NAUTICAKIDS marks.
- E. Product "color boards".
- F. Photographs of fragrance lines of Opposer.
- G. Product catalogues of Opposer.
- H. "TV network and print media ads reports and Look Book reports."
- I. "Opposer sponsorship materials".
- J. "Summaries - Opposer's U.S. annual wholesale sales (2001-2007) and annual advertising/promotional expenditures (2000-2007)."

3. Nautica's First Notice of Reliance: Forty-five certified status and title copies of U.S. trademark and/or service mark registrations owned by Nautica.

4. Nautica's Second through Twenty-Third Notices of Reliance: third party articles printed from Nexis.

5. Nautica's Twenty-Fourth Notice of Reliance: "various decisions and/or findings issued by the Trademark Trial and Appeal Board and/or the U.S. District Courts."

STATEMENT OF THE ISSUES

There are two issues raised by Nautica in its Opposition that remain in this proceeding:

(1) Nautica's assertion that Martanna's trademark, GET NAUTI, so resembles certain of Nautica's registered marks as to be likely to cause confusion, mistake or to deceive, and thus that Martanna's GET NAUTI trademark should be refused registration; and (2) Nautica's assertion that registration of GET NAUTI should be refused because such registration would result in dilution of Nautica's registered mark NAUTICA.

RECITATION OF THE FACTS

1. On April 15, 2005, Martanna filed its Trademark/Service Mark Application, Principal Register for the mark GET NAUTI with the United States Patent and Trademark Office (the "Application"). The Application provided that Martanna intended to use the GET NAUTI trademark (the GET NAUTI trademark that is the subject of the referenced Application shall hereinafter be referred to as the "GET NAUTI Mark") in commerce on or in connection with certain identified goods and/or services in International Classes 3, 18 and 25. (See the Application at p. 1 of 2).

2. An Office Action was instituted in response to the Application on November 22, 2005 (the "Office Action"). In that Office Action, the United States Patent and Trademark

Office (the “PTO”) refused to register the GET NAUTI Mark because the GET NAUTI Mark, “when used on or in connection with the identified goods, so resembles the mark in U.S. Registration No. 2,706,636, as to be likely to cause confusion, to cause mistake, or to deceive.” (Office Action at p. 1 of 5). The PTO also found that “[t]here may be a likelihood of confusion between” the mark identified in Application Serial No. 76/50177 and the GET NAUTI Mark. Id.

3. U.S. Registration No. 2,706,636, as referred to in the Office Action, was for the word mark NAUTI GEAR. (Office Action at p. 2 of 5). Application Serial No. 76/50177, as referred to in the Office Action, was for the word mark I GOT “NAUTI”. (Office Action at p. 4 of 5). Significantly, the PTO did not identify the GET NAUTI Mark as likely to cause confusion, to cause mistake, or to deceive, with any of the registered marks that Opposer identifies as the basis of its opposition to the PTO’s registration of Martanna’s GET NAUTI Mark. (See generally Office Action). The PTO further did not find that there was a potential likelihood of confusion between the GET NAUTI Mark and any of the marks that Opposer identifies in its Notice of Opposition as having applications pending for registration. (See generally Office Action).¹

4. On May 17, 2006, Martanna filed its Amendment and Response to Office Action (the “Response”). In the Response, Martanna deleted International Class 18 from its Application, amended its recitation of goods in International Classes 3 and 25, noted that the PTO had issued a Notice of Abandonment of the application for the I GOT “NAUTI” mark, and argued that the GET NAUTI Mark was not likely to cause confusion, to cause mistake, or to deceive with respect to the NAUTI GEAR mark. (See the Response at pp. 2 – 9).

¹ Of the 11 pleaded marks in the Notice of Opposition that had applications pending when the Opposition was filed, only 3 of those applications had been filed with the PTO when the Office Action was instituted.

5. On March 14, 2007, the PTO issued a Notice of Publication Under 12(a) for Martanna's GET NAUTI Mark. On May 1, 2007, Opposer filed its Notice of Opposition Pursuant to 15 U.S.C. § 1063 (the "Opposition") with the Board. The Board generated a Notice of Opposition in conjunction with Opposer's Notice of Opposition Pursuant to 15 U.S.C. § 1063 (the "Notice"). In the Opposition, Opposer alleged that it owns 54 (fifty-four) trademarks listed therein with the registration or application numbers identified therein.

6. In the Opposition, Opposer identified registration numbers for 43 (forty-three) of the 54 (fifty-four) trademarks Opposer alleges it owns. (Opposition at ¶ 5).

7. In the Opposition, Opposer also identified serial numbers and application dates, with no registration numbers, for the remaining 11 (eleven) of the 54 (fifty-four) marks Opposer alleges it owns. (Opposition at ¶ 5). Opposer admitted that these 11 marks were pending registration when this action was filed. Id.

8. Since this action was filed, 4 (four) of the 11 (eleven) marks pending registration cited in the Opposition, NAUTICA GOLF (Serial No. 78275470), NAUTICARE (Serial No. 77081223), NAUTICA OPTIONS (Serial No. 77081234) and NAUTICA BERMUDA BLUE (Serial No. 78963691) have proceeded to registration.

9. Further, since this action was filed, the application for 1 (one) of the 11 (eleven) marks pending registration cited in the Opposition, NAUTICA GOLF with application serial no. 78275470, has been abandoned.

10. Finally, since this action was filed, the remaining 6 (six) of the 11 (eleven) marks pending registration cited in the Opposition are still pending registration. (See TARR for application serial nos. 78713715, 78763730, 78912365, 77085720, 77085766, and 77085787. Opposer filed these 6 applications on an intent-to-use basis only.

ARGUMENT

I. OPPOSER HAS NOT ESTABLISHED PRIORITY OVER MARTANNA'S GET NAUTI MARK IN CERTAIN OF ITS CITED MARKS FOR PURPOSES OF ITS CLAIM OF PRIORITY AND LIKELIHOOD OF CONFUSION UNDER 15 U.S.C.S. §1052(d)

In its Opposition, Nautica alleged the priority over Martanna's GET NAUTI Mark of 54 marks (hereinafter, "Opposer's Marks" or "Nautica's Marks"). (See, Opposition at ¶¶ 5, 11 and 15). Nine of the marks that Opposer alleged and referred to in support of its priority and likelihood of confusion claim were marks for which intent-to-use based applications were filed after Martanna filed its application. See Opposition at ¶ 5. These nine marks included the one mark cited by Nautica, NAUTICARE, that arguably could be said to incorporate as a prefix the letters N, A, U, T, I.² However, Nautica does not have priority in its marks whose actual and constructive dates of use fall after the constructive date of use established by the GET NAUTI application. We ask that the Board take this fact into account and appropriately discount Opposer's broad claims to priority. Because Nautica does not have priority in these marks, including NAUTICARE, we submit that Nautica cannot rely on these marks in support of its opposition, and that Applicant is entitled to judgment with respect to Opposer's claims of priority and likelihood of confusion based on these marks.

For purposes of establishing priority, Opposer may claim the filing date of the intent to use applications for certain of its marks as the dates of constructive use of these marks. See §7(c) of the Trademark Act of 1946 ("Section 7(c)"), 15 U.S.C.S. § 1057(c) ("Contingent on the registration of a mark on the principal register provided by this chapter, the filing of the

² During the period since the Opposition was filed, the PTO accepted a statement of use regarding Opposer's application to register three of these marks: NAUTICARE, NAUTICA OPTIONS and NAUTICA BERMUDA BLUE. However, the dates of first use for these marks cited by the Opposer were in January 2008 and February 2008, so Martanna's point remains valid: these marks do not have priority because Martanna's constructive use date for GET NAUTI precedes both the application dates and actual use dates for NAUTICARE, NAUTICA OPTIONS and NAUTICA BERMUDA BLUE. See, e.g. Nautica Case Brief at 8 and 12.

application to register such mark shall constitute constructive use of the mark, conferring a right of priority, nationwide in effect, on or in connection with the goods or services specified in the registration”). See also, Zirco Corp. v. Am. Tel. & Tel. Co., 21 U.S.P.Q.2d 1542, 1544 (T.T.A.B. 1991) (finding that intent-to-use applicant is entitled to rely on the constructive use date of its application pursuant to Section 7(c) prior to actual use and registration of applicant’s mark. If such reliance was not permitted, the applicant “would be rendered defenseless in any opposition against the registration of its mark based on likelihood of confusion.”); Larami Corp. v. Talk To Me Programs, Inc., 36 USPQ2d 1840, 1844 (T.T.A.B. 1995) (“To require registration of an applicant's mark prior to realization of its rights under Section 7(c) would defeat the purpose of filing applications based on intent-to-use.”).

As Opposer admits in the Opposition at ¶ 5, the earliest dates that Opposer may rely upon as the constructive dates of use for the marks for which intent to use applications are pending are as follows:

MARK	SERIAL NO.	APPLICATION DATE
NAUTICA	77085720	1/18/2007
NAUTICA	77085766	1/18/2007
NAUTICA	77085787	1/18/2007
NAUTICA ISLAND	78912365	6/20/2006
NAUTICA	78763730	11/30/2005
NAUTICA NAVY	78713715	9/15/2005

The earliest of these dates is September 15, 2005. Martanna filed its intent-to-use Application on April 15, 2005. (See the Application at p. 1 of 2). April 15, 2005 is earlier than September 15, 2005 and well before the 2008 actual dates of use that Nautica identified for NAUTICARE, NAUTICA OPTIONS and NAUTICA BERMUDA BLUE, for which Nautica is no longer entitled to claim a constructive date of use. Opposer, therefore, is not entitled to a

finding that the referenced nine marks have priority over Martanna's GET NAUTI Mark. Accordingly, judgment should be entered in favor of Martanna on Opposer's priority and likelihood of confusion claim with respect to these nine marks for which applications were pending at the time the Opposition was filed.

II. JUDGMENT SHOULD BE GRANTED IN FAVOR OF MARTANNA BECAUSE OPPOSER'S LIKELIHOOD OF CONFUSION CLAIM IS NOT SUPPORTED BY THE EVIDENCE OF RECORD OR APPLICABLE LAW

Opposer alleged that Martanna's intended use and registration of the GET NAUTI Mark "will cause the relevant purchasing public to erroneously assume and thus be confused, misled, or deceived, that Applicant's Goods and Services are made by, licensed by, controlled by, sponsored by, or in some way connected, related or associated with Opposer" (Opposition at ¶ 16).³ A comparison of Martanna's GET NAUTI Mark to each of Opposer's Marks under applicable law, however, confirms that the GET NAUTI Mark is not likely to be confused with any of Opposer's Marks.⁴

Section 1052 of Chapter 22 of Title 15 of the United States Code provides that "[n]o trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it - -"

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.

³ As indicated above, the PTO did not cite to any of Opposer's Marks as a potential basis to preclude registration of Martanna's GET NAUTI Mark. (See ¶ 3 of Recitation of the Facts).

⁴ For purposes of this argument, if for any reason the Board may disagree with Martanna's position as to lack of priority of certain of the marks that Nautica cited in its Opposition, Martanna is addressing herein Opposer's claim of likelihood of confusion with respect to all of Opposer's registered marks.

15 U.S.C.S. § 1052(d). The Board considers several factors when determining whether a likelihood of confusion exists between marks. See In re E.I. DuPont DeNemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973) (referred to herein as the “*DuPont* factors”). Clearly, the most relevant *DuPont* factor to consider in the instant matter is the “similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” Id. The dissimilarity of opposing marks can be a dispositive factor rendering a party unable to proceed on a likelihood of confusion claim. See, e.g., Champagne Louis Roederer, S.A. v. Delicato Vineyards, 148 F.3d 1373, 1375, 47 USPQ2d 1459 (Fed. Cir. 1998) (affirming the Board’s dismissal of an opposition alleging likelihood of confusion between applicant’s CRYSTAL CREEK mark and opposer’s CRISTAL and CRISTAL CHAMPAGNE marks. According to the Board, the dissimilarities of the marks in appearance, sound, significance and commercial impression alone “precluded any reasonable likelihood of confusion.”). See, also, Kellogg Co. v. Pack’Em Enterprises, Inc., 951 F.2d 330, 332 - 33, 21 USPQ2d 1142 (Fed. Cir. 1991) (affirming the Board’s grant of summary judgment in applicant’s favor and finding that the Board correctly determined that the “first *DuPont* factor simply outweighs all of the others which might be pertinent to this case.”).

As demonstrated herein, Martanna’s GET NAUTI Mark differs substantially in appearance, sound, connotation and commercial impression from Opposer’s Marks.⁵

⁵ While the first *DuPont* factor is dispositive in this matter, the second *DuPont* factor also supports a finding that confusion between Martanna’s GET NAUTI Mark and Opposer’s Marks is not likely. Specifically, Martanna’s GET NAUTI Mark is associated with goods classified in International Classes 3 and 25. Twenty-three (23) of Opposer’s Marks are not associated with either of these International Classes of goods. (See Notice of Opposition at pp. 2 – 15). Consequently, any likelihood of confusion is significantly diminished because Martanna’s GET NAUTI Mark will be used in connection with goods that are significantly different than those with which 23 of Opposer’s Marks are identified.

A. Martanna's GET NAUTI Mark is Dissimilar in Appearance, Sound, Connotation and Commercial Impression from Opposer's Marks

- i. Martanna's GET NAUTI Mark is dissimilar in appearance from each of Opposer's Marks.

There are several bases on which the Board should find that Martanna's GET NAUTI Mark is dissimilar in appearance from each of Opposer's Marks.⁶ First, the GET NAUTI Mark consists of two words, GET and NAUTI. Neither of these words is used in any of Opposer's Marks. See generally Opposition at ¶ 5. To confirm this fact, the Board can group the 47 (forty-seven) marks cited in the Opposition that are now registered into the following five categories of marks:

- (1) the word NAUTICA (21 registered trademarks);
- (2) the word NAUTICA followed by one word (e.g., NAUTICA BEACH) (12 registered trademarks);
- (3) the word NAUTICA followed by 2 or 3 words (e.g., NAUTICA BERMUDA TABLEWARES) (5 registered trademarks);
- (4) the word NAUTICA used as the beginning of a one-word compound mark (NAUTICAKIDS and NAUTICARE⁷) (8 registered trademarks); and
- (5) the word NAUTEX (1 registered trademark).

None of these marks includes the word GET and none includes the word NAUTI.

In 46 of the 47 marks cited by Opposer, as indicated above, the mark consists of either solely the word NAUTICA or a combination of words or a compound word beginning with the

⁶ That Opposer allegedly has a number of registered marks does not change the fact that Martanna's GET NAUTI Mark and Opposer's Marks are not confusingly similar.

⁷ See, e.g., Bizzari Transcript at 67 (cross) ("Q.: Now you agree, don't you, that NAUTICARE includes your principal mark NAUTICA? A.: Yes, but I think that it's – yes. Q.: Yes. N-A-U-T-I-C-A is part of that, is within that mark, correct? A.: Yes.")

word NAUTICA. This factor fundamentally distinguishes the appearance of these marks from Martanna's GET NAUTI Mark since Martanna's mark neither begins with nor incorporates the word NAUTICA. Martanna's GET NAUTI Mark also has a significantly different appearance than the remaining one-word Mark of Opposer, NAUTEX. In fact, none of Nautica's Marks begin with either GET, the letter G, or any combination of letters other than NAUTICA (or in one case NAUTEX). See Presto Products, Inc. v. Nice-Pak Products, Inc., 1988 TTAB LEXIS 60, at *8, 9 USPQ2d 1895 (T.T.A.B. 1988) ("[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered.").⁸

The appearances of Opposer's Marks also differ from the appearance of the GET NAUTI Mark in that none of Opposer's Marks includes the word NAUTI, used either independently (as used in Martanna's mark), or as a prefix or suffix to another word. For example, in Opposer's mark NAUTICAKIDS, the prefix is NAUTICA, not NAUTI. To decipher the NAUTICAKIDS marks differently would nonsensically suggest that NAUTI is the prefix to KIDS. Analyzing the construction of NAUTICAKIDS in this tortured manner is counterintuitive and not proper. Cf. Massey Jr. College, Inc. v. Fashion Institute of Tech., 492 F.2d 1399, 1402, 181 USPQ 272, 273 (C.C.P.A. 1974) ("That marks must be considered in their entirety in determining whether there is likelihood of confusion or mistake is a basic rule in comparison of marks."). Based on these significant differences in appearance, it is highly unlikely that consumers will mistakenly believe that goods sold under the GET NAUTI Mark is an expansion of Opposer's Marks.

We respectfully submit that it would be improper for the Board to engage in "dissection" and consider treating the letters N, A, U, T, I as a prefix as used in most of Nautica's Marks.

⁸ The Board should flatly dismiss Nautica's false and baseless statement that "[t]he Applicant intended for the consumer to view the mark [GET NAUTI] as 'NAUTI' – a term identical to NAUTICA except for the last two letters." Nautica Case Brief at 14.

This is clear from the Court's consideration of analogous circumstances in Gaby, Inc. v. Irene Blake Cosmetics, Inc., 35 C.C.P.A. 238, 166 F.2d 164; 76 USPQ 603 (February 10, 1948). In that case, the Court examined the limits of a registrant's claims regarding its registration of its corporate name, Gaby, Inc.

There are many words having a variety of definitions which begin with "Gab." In many instances "Gab" forms the first syllable. We do not think appellant by using its name as a trade mark and registering it as such, may so preempt the field as to secure a monopoly upon such words and prevent others from using, and in proper cases registering, those which happen to begin with "Gab," and we think if it could prevent the registration of "Gabardine" in this case, it could prevent the registration of all the other words having "Gab" as the first syllable which the dictionaries show.⁹

Similarly, Nautica cannot, through its registration of NAUTICA, "preempt the field" as it is seeking to do in this proceeding. It cannot prevent Martanna from using and registering a mark simply because it uses as an independent word the first five letters of the NAUTICA mark, particularly when the overall appearance (as well as sound and connotation) of Martanna's GET NAUTI Mark is so dissimilar both from NAUTICA and from any of Nautica's Marks.

- ii. Martanna's GET NAUTI Mark is dissimilar in sound from each of Opposer's Marks.

Martanna's GET NAUTI Mark begins with the word GET, while all of Opposer's Marks begin with the word NAUTICA or in one case the word NAUTEX. Consequently, when spoken, the GET NAUTI Mark sounds significantly different than any of Opposer's Marks.

Further, the word NAUTI in Martanna's GET NAUTI Mark is pronounced differently than the letters N, A, U, T, I that are contained in 46 of the 47 of Opposer's cited registered marks. The GET NAUTI Mark is pronounced "get naughty". See the Office Action Response at

⁹ Gaby, Inc. v. Irene Blake Cosmetics, Inc., 35 C.C.P.A. LEXIS 238, at *7, 166 F.2d 164; 76 USPQ 603, 605 (February 10, 1948).

¶ II(B)(1) in which Martanna confirmed the obvious, i.e., that the word NAUTI, as used in its GET NAUTI Mark, has the meaning “naughty”. The fact that Applicant attested to this intended meaning and attendant pronunciation prior to the filing of the Opposition is strong evidence of the fact that the Applicant selected this mark to be used and pronounced in this way.

The letter “I” in the word NAUTI is pronounced in the same way as the letter “y” is in the word “naughty”, as a long “e” sound. Id. Any other pronunciation, including pronouncing the letter “I” as a short “i” sound as “ih” or as a schwa sound would be nonsensical. Moreover, Martanna is unaware of any word in English or any other language that ends in the letter “I” preceded by a consonant in which that final letter is pronounced as “ih” or as a schwa sound. In contrast, in each of Opposer’s cited marks that include the letters N, A, U, T, I, the letter “I” is pronounced as a short “i” or schwa sound, and Opposer has not made any arguments to the contrary. The difference in sound, therefore, between the GET NAUTI Mark and each of Opposer’s Marks is substantial.

- iii. Martanna’s GET NAUTI Mark is also dissimilar in connotation and commercial impression from each of Opposer’s Marks.

The factors discussed above that establish the differences in appearance and sound between the GET NAUTI Mark and Opposer’s Marks also contribute to the unique meaning or connotation, and to the commercial impressions, conveyed by the GET NAUTI Mark that are not shared by any of Opposer’s Marks. The GET NAUTI Mark is structured as an imperative sentence made up of a verb, GET, and an adjective, NAUTI. The understood subject of the

sentence is “you”. The word NAUTI is intended to be a fanciful spelling of the word “naughty”.¹⁰

When viewed alone, the word NAUTI arguably might not immediately convey the impression of an alternate fanciful spelling of the word “naughty”. However, because the word NAUTI follows the imperative verb GET in Martanna’s mark, NAUTI is understood and pronounced as “naughty”. We submit that no other understanding and pronunciation is possible. This fact is illustrated by use of the word “nauti” with other words in the series of books referenced in Martanna’s Third Notice of Reliance: NAUTI DREAMS, NAUTI NIGHTS and NAUTI BOY. In each of these instances, the connotation of mischievous behavior or risqué romance is conveyed through a two-word title; it would be ridiculous to contend that any of these titles could possibly convey a connotation related to Nautica, the mark NAUTICA or any of Opposer’s Marks.

Purchasers, without question, will recognize GET NAUTI as a play on “Get naughty!”. The impression conveyed will be one of a lighthearted, imperative sentence such as “Get ready!”, “Get happy!” or “Get funky!”. Cf., Lever Bros. Co. v. Barcolene Co., 59 C.C.P.A. 1162, 1164, 463 F.2d 1107, 1108 – 09 (C.C.P.A. 1972) (affirming the Board’s decision that held that the opposer’s mark ALL and the applicant’s mark ALL CLEAR, as applied to similar goods, were not so similar as to be likely to cause confusion. The commercial impression of the applicant’s mark ALL CLEAR was derived from the mark as a whole, not from its component parts, which purchasers would recognize as a play on the expression “all clear!”).

Conversely, none of Opposer’s Marks contain a verb, none of Opposer’s Marks are structured as a sentence, and none of Opposer’s Marks, therefore, are structured as an imperative

¹⁰ As indicated, in the Response at ¶ II(B)(1), Martanna confirmed to the PTO that the word NAUTI, as used in its GET NAUTI Mark, has the meaning “naughty”.

sentence directed toward the consumer, “you,” like Martanna’s GET NAUTI Mark. Moreover, none of Opposer’s Marks convey a connotation similar to the “get naughty!” connotation of Martanna’s Mark. In fact, Opposer advised the PTO in the context of its registration of the mark NAUTICA that “THE ENGLISH TRANSLATION OF THE WORD ‘NAUTICA’ IN THE MARK IS ‘NAUTICAL’.” (See Martanna’s Second Notice of Reliance). This admission by Opposer is significant. Indeed, the commercial impression conveyed by Opposer’s Marks, all of which except one contain the word NAUTICA, is of nautical or water-related products. This commercial impression of a nautical theme is underscored in those of Opposer’s Marks that also include other water-related words, such as NAUTICA BEACH, NAUTICA BLUE and NAUTICA VOYAGE (see Opposition at ¶ 5). Martanna’s Mark and Opposer’s Marks have entirely different connotations and convey entirely different commercial impressions.¹¹

iv. The Pronunciation and Meaning of GET NAUTI Is Conveyed by Observation of the Mark as a Whole---This Pronunciation and Meaning is Not Shared with Any of Nautica’s Marks

As explained in Martanna’s First Notice of Reliance, a dictionary’s definition of the word GET, the first word in Applicant’s mark, includes “to reach or enter into a certain condition <got to sleep after midnight>” and “to succeed in becoming: BECOME <how to ~ clear of all the debts I owe – Shak.>.” The dictionary reference included in that notice contains the following guidance regarding the usage of the word “get” as a passive auxiliary and as an imperative:

usage The pronunciation \`git\ has been noted as a feature of some British and American dialects since the 16th century. ... It nonetheless remains in widespread and unpredictable use in many dialects, often, but not

¹¹ See, e.g., Bizzari Transcript at 58 (describing the meaning of the “core image” conveyed by the Nautica brand: “It means to me somebody active. They’re in a higher income level, they are sailors, they’re sports-oriented people, they love the water, they’re beach people.”)

exclusively, when *get* is a passive auxiliary (as in *get married*) or an imperative (as in *get up!*).

As referenced above, the meaning conveyed by Applicant's mark is analogous to the latter example provided above, "get up!", namely the short imperative sentence, "get naughty!" The referenced dictionary entry also demonstrates that the word "get" can have many meanings, and that these meanings are largely dependent on other words with which it is used. For example, as used in Applicant's Mark, which would be understood by a consumer as a two-word phrase or sentence, the meaning of GET as the precedent to NAUTI would naturally establish the appearance of an imperative sentence. Comprehension in this way is made even more likely by the fact that similar two-word imperative sentences or expressions beginning with "get" are common in the English language. "Get up!" is the example referenced in the dictionary cited above, but, as discussed in the prior section of this brief, other such expressions include "Get ready!", "Get happy!" and "Get funky!", and "Get going!", "Get started!", "Get crazy!" "Get down", "Get off!", "Get wild!" "Get cracking!" are common usages, as well. In the context of such common usage and construction, the meaning "get naughty!" clearly is the meaning conveyed by Martanna's mark, GET NAUTI.

Nautica asserts in its Case Brief that the word "get" is capable of several meanings, and that the "primary meanings" of this word are to "obtain" or "come into possession of" and "to become" or grow to be."¹²

With regard to the first of these definitions, Nautica argues that Martanna's GET NAUTI Mark "may be perceived as a NAUTICA variant and as a way to associate oneself with the

¹² Nautica Case Brief at 12. Not surprisingly, Nautica's witness, an in-house trademark paralegal (Bizzari Transcript at 4, 24-25, 34-35, and 58), gave self-serving testimony relative to the GET NAUTI Mark that "get" means "obtain, get, find, have. Be." Bizzari Testimony at 120.

Nautica brand and lifestyle.”¹³ In proffering this meaning, Opposer implies that a consumer reading the mark GET NAUTI would understand that the thing that it should get is NAUTI, which the consumer would then further understand to be another word for NAUTICA. This is preposterous. Opposer has provided absolutely no support for a contention that customers would associate NAUTI – particularly when used as a stand-alone 5-letter word – to have any connection to NAUTICA, much less that consumers do or would understand the meaning of NAUTI to be goods bearing the NAUTICA mark.

Moreover, in making this argument, Nautica returns (or nearly so) to an argument that it asserted in its Opposition upon which the Board has already ruled. Specifically, in ruling on Nautica’s motion to strike certain defenses raised by Nautica in its answer to the Opposition, the Board stated the following:

to the extent that opposer intends to pursue a Section 2(a) false suggestion of a connection claim (as identified in the ESTTA notice of opposition form), we find such claim insufficient. To state a claim of false suggestion of a connection under Section 2(a), opposer must allege facts that set out the elements of such a claim, i.e., (1) that the mark (or part of it) is the same as or a close approximation of the person’s previously used name or identity; (2) that the mark would be recognized as such (that is, the mark points uniquely to that person); (3) that the person in question is not connected with the goods or services of the applicant, and (4) that the person’s name or identity is of sufficient fame that when it is used as part or all of the mark on applicant’s goods/services, a connection would be presumed by someone considering purchasing the goods/services. See University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc., 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

Although opposer has alleged in paragraphs 8, 9, and 14 of the notice of opposition that “Opposer’s marks are famous”; that opposer “for many years is trading and is known by Opposer’s marks”; and that applicant’s use of its mark is “without the consent or permission of Opposer”, we find that opposer has failed to sufficiently allege that applicant’s mark is the same as or a close approximation of opposer’s identity or persona; that applicant’s mark would be recognized as such; and that opposer’s identity

¹³

Id.

or persona is of sufficient fame or reputation that when applicant's mark is used on its goods, a connection to opposer would be presumed.

Inasmuch as applicant's first affirmative defense is valid with respect to opposer's Section 2(a) claim of a false suggestion of a connection with opposer, opposer's motion to strike applicant's first affirmative defense is denied.¹⁴

Nautica should not be permitted to raise this same argument – in essence that GET NAUTI is or would be recognized as the same as or a close approximation of Nautica or its “lifestyle” -- in the guise of a likelihood of confusion argument.

Furthermore, despite Nautica's unfocused discourses as to the supposed “primary” meaning of “nauti” and the asserted “root” syllable “naut,” Applicant's Mark is not NAUTI -- it is GET NAUTI. This fact is of utmost importance in this proceeding, because the commercial impression conveyed by Martanna's mark is conveyed by the mark as a whole. Simply put, none of Nautica's asserted meanings of “GET NAUTI” are plausible (e.g., “obtain Nautica goods”). Martanna has maintained throughout the application examination process and this proceeding that the meaning of its mark is “get naughty.” Nautica does concede that a consumer viewing Applicant's GET NAUTI Mark may understand the second word of this mark to be “a play on the word ‘naughty.’”¹⁵ Nevertheless, Nautica's Case Brief puts forth other, tortured explanations as to the alleged meaning of Applicant's mark that stubbornly ignore the unique meaning conveyed by the GET NAUTI Mark as a whole that is not shared by any of Opposer's Marks. Nautica's witness was more straightforward in conceding that Opposer's Marks do not convey a connotation that is the same as or similar to “naughty”:

Q.: Is your mark, NAUTICA, is it intended to invoke something risqué?

A.: The word NAUTICA, no.

¹⁴ TTAB ruling of September 20, 2007 on Opposer's motion to strike certain of Martanna's affirmative defenses in its answer to the Notice of Opposition at 3-5 (emphasis added).

¹⁵ Nautica Case Brief at 13.

Q.: Something bad?
A.: No
...
Q.: How about your mark NAUTICAKIDS? Is that intended to invoke something risqué?
A.: Absolutely not.
Q.: Something bad?
A.: No.
...
Q.: What about your mark NAUTICARE N-A-U-T-C-A-R-E, is that intended to evoke something risqué?
A.: No.
Q.: Or bad?
A.: No.
Q.: Or coy?
A.: No.
Q.: Or sensual?
A.: No.
Q.: Or even erotic?
A.: No.¹⁶

The Board should also take note that Nautica has conceded that a consumer would read GET NAUTI as an imperative expression, an instruction exhorting the consumer to do something.¹⁷ In contrast, as discussed supra, none of Opposer's Marks contain a verb, none of Opposer's Marks are structured as a sentence, and none of Opposer's Marks, therefore, are structured as an imperative sentence. Nautica has not attempted to deny these facts, which highlight the overwhelming differences in appearance, sound, meaning and commercial impression between GET NAUTI and any of Opposer's Marks.

Opposer also argues that the meaning of Applicant's Mark is an instruction to a consumer to get "NAUTI" which Opposer argues is a thing that could be obtained.¹⁸ On the other hand,

¹⁶ Bizzari Testimony at 121-124. Although Nautica's witness testified that certain advertising campaigns for Nautica products have been "more risqué" than others, she did not claim that any of Opposer's Marks conveyed a meaning or impression of "risqué" or anything similar to "naughty". Id. at 122.

¹⁷ Nautica Case Brief at 13.

¹⁸ Id.

Opposer argues that “nauti” is an adjective meaning “things of the water/things nautical, or Opposer, Nautica” -- but it stops short of making the absurd assertion, which would follow from its previous “analysis,” that a consumer would read GET NAUTI to mean “obtain nautical.”¹⁹ Opposer cannot have it both ways.

A fundamental and irrefutable difference in the appearance, sound, meaning and commercial impression of GET NAUTI – viewed in its entirety -- as compared to any of Nautica’s Marks is the fact that NAUTI is used as a separate word, the second of two words that Opposer concedes would be read as a short imperative sentence. We reiterate that, in viewing the mark GET NAUTI, prospective customers would unquestionably pronounce the second word as “naughty”, that is, with a long “e” sound. Opposer has not and could not put forth a contrary argument on this point, nor has it argued in its Case Brief or presented any evidence that in Nautica’s NAUTICA marks, all of which include the letters N, A, U, T, I, the letter “I” is pronounced as anything other than a short “I” or schwa sound. The second word in GET NAUTI and the first two syllables of the mark NAUTICA are not pronounced in a similar fashion.

Thus, the context in which the word NAUTI appears in Applicant’s mark (as a stand-alone word) determines its sound (whether actually spoken or understood), and it is this sound that conveys its meaning. We submit that no consumer, English-speaking or otherwise, encountering the mark GET NAUTI would pronounce these words in any other way but “get naughty.” In reading GET NAUTI, prospective customers hear “get naughty”, and the meaning of this call to action carries a commercial impression that is completely unrelated to that conveyed by any Opposer’s Marks. Consequently, any possible confusion as to the source of Applicant’s goods is highly unlikely.

¹⁹ Id.

Accordingly, as demonstrated by the foregoing, Martanna's GET NAUTI Mark, when used on or in connection with the goods identified in Martanna's Application, is not likely to confuse or cause consumers to be mistaken or deceived with respect to Opposer's Marks.

B. Nautica's Reliance on Certain "Variations" as Implied Extensions of Its Registered Mark Is Without Foundation, and Should Not Be Considered As Support for Nautica's Likelihood of Confusion Argument

In its Case Brief, Nautica argues that in addition to using its cited registered Marks in connection with the sale of its goods, it has "also used numerous other (non-registered) variations of its famous NAUTICA mark, including, without limitation, the following, which show the manner in which other variations have been used from time-to-time on clothing."²⁰

Nautica then proceeds to reproduce images of several clothing designs upon which the marks NAUTICA JEANS and NAUTICA JEANS COMPANY appear, in some cases with one or more letters partially or wholly obscured as part of the design, and in some cases with spacing between the letters of these words which is inconsistent with the registered marks. Nautica argues that these "variations" are "natural variant expressions of Nautica's Marks that have appeared from time-to-time in the natural course of marketing and commercialization of Nautica's goods." Nautica asserts that it is the "owner" of such non-registered "variations."

Through these assertions, Nautica appears to be taking the position that there exists a range of words and phrases, "without limitation," which Nautica has never sought to register as trademarks, but to which Nautica can nevertheless claim as extensions of the protection afforded by its registered marks. In particular, Nautica implies that its argument regarding the likelihood of confusion between Martanna's GET NAUTI Mark and Nautica's registered Marks is

²⁰ Nautica Case Brief at 9 (emphasis added).

somehow bolstered by a supposed likelihood of confusion between GET NAUTI and an unlimited universe of unregistered variations of Nautica marks.²¹ Nautica's position is without any merit. Nautica clearly is not entitled to this kind of wholesale, unlimited protection under the law. Indeed, Nautica appears to acknowledge this fact as it offers no support for its position. The Board should completely disregard this tangent of Nautica's argument.²²

The same holds true for the "variation" "BE NAUTI" that Nautica claims to have used on boxer shorts.²³ To the best of Applicant's knowledge, Nautica has never applied to register "BE NAUTI" as a trademark.²⁴ As such, Nautica's asserted use of these words on goods it produced and/or sold is irrelevant to the instant proceeding.

However, to the extent that the Board may give any weight to this evidence, Martanna submits that according to Nautica's witness, Nautica first used "BE NAUTI" approximately two years after Applicant filed its application to register GET NAUTI and at approximately the same time Nautica filed the Opposition.²⁵ Thus, if the Board were to view Nautica's asserted use of BE NAUTI as analogous to the use by an applicant, Martanna's GET NAUTI Mark would

²¹ With respect to the reference in 15 U.S.C. §1052(d) to "a mark or trade name previously used in the United States by another and not abandoned" as a possible basis for a likelihood of confusion determination, Nautica did not assert this basis in the Opposition, it has not provided a listing of the specific "variations" that are supposedly relevant to this proceeding, nor has it introduced evidence in the record demonstrating that any of its unregistered "variations" are in use or that if they were in use at some time they have not since been abandoned.

²² Assuming, arguendo, that there may be any possible merit to Nautica's position, the record is devoid of any meaningful evidence of the extent of Nautica's use of the supposed "variations" of its NAUTICA mark. See, e.g., the "color boards" and "look books" that Nautica placed in the record as Exhibit C to Bizzari Transcript, which lack meaningful context as to use. See also, Bizzari Transcript at 76-92 and 101-112, in which Nautica's witness admits that she has no personal knowledge regarding the sale or advertising of products bearing the designs appearing on the several color boards and look books that Nautica placed in the record.

²³ As with the other "variations," the record is devoid of any meaningful evidence of the extent of Nautica's use of this supposed "variation" of its NAUTICA mark. See Exhibit C to Bizzari Transcript and Bizzari Transcript at 97-101. Furthermore, to the extent that the Board views this exhibit as evidence of use, the documents presented therein that reference "BE NAUTI" are dated 2007, indicating that Nautica only began to use this "variation" after Martanna filed its application to register GET NAUTI.

²⁴ See Bizzari Transcript at 119.

²⁵ Id. at 96-97.

nonetheless have priority in the instant proceeding. Moreover, Nautica has not put forth any colorable argument that any consumer viewing BE NAUTI would associate those words with the mark NAUTICA or with Nautica itself. The more likely meaning that these words would convey to a consumer – particularly, as apparently used by Nautica, when they appear on the front opening of a pair of men’s underwear – is “be naughty,” the same meaning of NAUTI conveyed by the GET NAUTI Mark.

Furthermore, Nautica decided to use BE NAUTI on some men’s underwear about two years after Martanna filed its GET NAUTI application and at about the same time that Nautica filed the Opposition. In these circumstances it appears that Nautica’s decision to use BE NAUTI in a limited way on some underwear allegedly sold primarily through TJ Maxx and Marshall’s discount stores²⁶ was little more than a litigation tactic intended to buttress its weak Opposition. We believe that this is further demonstrated by Nautica’s own evidence of the “high end” nature of its Nautica “lifestyle” product line and the Nautica image:

Q. Does the Nautica brand have what you would refer to as a core image?

A. Yes.

Q. What is a brand core image?

A. The core image is the person that is active, that likes to do outdoor sports. You’re talking about a person you want me to describe, or an image of the company?

Q. Just what it means to you.

A. It means –

Q. The phrase “core image”?

A. It means to me somebody active. They’re in a higher income level, they are sailors, they’re sports-involved people, they love the water, they’re beach people.

Q. And would that also extend to the core image for the Nautica brand being tied to a higher quality, let’s say products?

²⁶

Bizzari Transcript at 99.

A. Oh, absolutely. I think Nautica is a product that is of a high end.

Q. So just getting back to what you said about Nautica's core image, the Nautica brand, at least in your mind, the Nautica image evokes the sea, sailing? Could you answer yes or no?

A. Yes.

Q. Marinas?

A. Not necessarily marinas, but okay, if that's a water thing.

Q. Yachting?

A. Yes.

Q. Generally things that are nautical?

A. Yes.²⁷

Nautica asserts that if the Board permits registration of GET NAUTI, this will somehow "place a cloud on Nautica's right to use the root 'nauti' in forms such as 'BE NAUTI'" or the multitude of possible unregistered "variations" that supposedly break up or distort Nautica's registered marks in ways that highlight the letters N, A, U, T, I contained therein.²⁸ Nautica does not, however, explain how registration of Martanna's mark would have such effect. Moreover, Nautica has not explained why it should be shielded from having to defend its right to use certain unregistered marks if such a challenge were raised by another party.

Nautica also asserts that if it "cannot enforce and protect its rights against others that seek, by use of similar marks [that is, by use of marks similar to the unlimited range of "variations" of Nautica's registered marks], to draw an association with Nautica, the famous mark NAUTICA loses significance and becomes diluted."²⁹ According to Nautica, the "fame of

²⁷ Bizzari Transcript at 58-59 (cross examination of M. Bizzari by counsel for Martanna).

²⁸ Nautica's witness confirmed that Nautica has never applied to register either NAUT or NAUTI as a trademark. Bizzari Testimony at 113.

²⁹ Nautica Case Brief at 16.

the NAUTICA mark and name require that Nautica be accorded a wide area of protection of its mark from both likelihood of confusion and from a likelihood of dilution.”³⁰

Although the Board in appropriate circumstances has applied the “wide berth” approach to likelihood of confusion analyses that involve famous marks,³¹ Nautica has distorted and unreasonably attempted to extend this doctrine to fit the facts of this case. Specifically, in its arguments regarding its “variations,” rather than trying to claim that GET NAUTI has improperly “approach[ed] the well-known trademark of a competitor,” i.e., NAUTICA, Nautica has argued that Martanna’s GET NAUTI Mark has improperly approached certain unregistered and not-well-known words, phrases and combinations of letters (and an unlimited range of other actual and hypothetical combinations) that the owner of a well-known mark asserts are “variations” of a well-known mark.³² This argument reaches far beyond the findings in the cases cited by Nautica, and should be rejected on that basis.

In fact, it is likely that an Examining Attorney would view these types of “variations” as either (1) wholly different marks or (2) material alterations of the mark depicted in the drawings Nautica submitted with its applications. For example, Nautica refers at page 9 of its Case Brief to its registration for the mark NAUTICA JEANS COMPANY (Registration No. 2523102). The TARR record for this registration indicates that the drawing submitted with the application to register this mark was a standard character (typed) drawing, which must be a “substantially exact

³⁰ Id. at 17 (emphasis added).

³¹ See, e.g., Nautica Case Brief at 28, citing Nina Ricci S.A.R.L. v. E.T.F. Enterprises Inc., 889 F.2d 1070, 12 USPQ2d 1901 (1989).

³² See, e.g., Nina Ricci S.A.R.L. v. E.T.F. Enterprises Inc., 889 F.2d 1070, 1074, 12 USPQ2d 1901 (1989)

representation of the mark” as used/intended to be used on the relevant goods and/or services.³³

If Nautica had submitted as a specimen to show the use of this mark one of the shirt designs displayed at page 11 of its Case Brief that read “N.AU.TI Co^A JNS” and “NAUT JEANS C,” it is very likely that the Examining Attorney would refuse to register this mark because the applied-for mark did not appear on the specimen.³⁴

Presented with such specimens, an Examining Attorney likely would have found the same fatal flaw with regard to Nautica’s application to register NAUTICA JEANS as a standard character mark (Registration No. 2474154). Alternatively, if Nautica had submitted the shirt design presented at page 10 of its Case Brief which reads “NAU TIC AJE ANS,” as a specimen demonstrating use of its NAUTICA JEANS mark, the Examining Attorney would likely determine that “the standard characters are displayed in a distinctive manner that changes the meaning or overall commercial impression of the mark,” and consequently the Examining Attorney would seek to process Nautica’s “drawing as a special form drawing, and require the applicant to delete the standard character claim.”³⁵ However, it is also likely that the Examining Attorney would refuse to amend Nautica’s standard character drawing to a special form drawing containing either the shirt’s design element or a claim to the distinctive formation of letters therein. This is because the Attorney may not permit such an amendment than constitutes a material alteration of the original drawing.³⁶

³³ See U.S. Patent and Trademark Office Trademark Electronic Search System at <http://tess2.uspto.gov/bin/gate.exe?f=tess&state=4005:s5nqb1.1.1>, search for Registration No. 2523102, and the Trademark Applications and Registrations Retrieval record for that registration, and 37 C.F.R. §2.51(a) and (b).

³⁴ See, e.g., T.M.E.P. at 904.07(a).

³⁵ T.M.E.P. at 807.03(e).

³⁶ T.M.E.P. at 807.03(d) and 37 C.F.R. §2.72.

Nautica also baldly asserts that certain of its registered marks also constitute “variations,” and claims that certain of its marks including NAUTICARE and NAUTEX “are used to identify Nautica as the source of certain Nautica product lines.”³⁷ There is no support for such a claim. Also, as discussed earlier, Nautica has not argued, nor could it legitimately argue, that all of its marks relied upon in this Opposition constitute a family of marks. In this regard, it has provided no evidence or argument to support a determination by the Board that a family of marks exists. In these circumstances, the Board should reject any possible claim by Nautica to the corresponding level of protection.³⁸

C. Opposer Argues That Its Mark Nautica Is Famous, but Any Such Fame Cannot Overcome the Dissimilarity Between GET NAUTI and Opposer’s Marks Including NAUTICA

Opposer’s documentary and testimony evidence in this proceeding, including some six thousand pages of documents introduced through notices of reliance, focuses on the fame that Nautica claims one of its marks – NAUTICA – is alleged to have acquired. Opposer has not claimed or provided evidence supporting as an assertion that any of its other Marks are famous, and Applicant submits that they are not. In particular, none of the documents that Nautica has placed in the record relating to advertising and promotional expenditures, sales figures, print and television media placements, and/or print media circulation and impression statistics quantifies what portion, if any, of these data relate to these other Marks, and Nautica’s witness provided no

³⁷ Nautica Case Brief at 12.

³⁸ Nautica has not argued that its registered marks constitute a family of marks containing the letters “naut” or “nauti,” or that the public would assume that any new mark beginning with either of those prefixes had been introduced from Nautica. Nautica has not introduced any evidence into the record that demonstrates such recognition of its marks as a family. Consequently, the Board should not view Nautica’s trademarks as a family of marks, but rather should consider the relevance of each of these marks to Nautica’s arguments individually. See Lauritzen & Co., Inc. v. The Borden Co., 239 F.2d 405; 112 USPQ 60 at 61-62 (1956).

testimony to the contrary.³⁹ Consequently, to the extent that the Board accepts Opposer's argument regarding the fame of NAUTICA⁴⁰ and considers this fame as a *DuPont* factor in favor of the Opposer, the Board should only consider this factor when evaluating the likelihood of confusion between Applicant's mark GET NAUTI and the mark NAUTICA.

To support its argument regarding the effect of the fame of its NAUTICA mark relative to its likelihood of confusion analysis, Opposer cites to Kenner Parker Toys v. Rose Arts Industries, Inc., 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992) ("Kenner"). In particular, Opposer references that court's statements that "[t]he fifth *DuPont* factor, fame of the prior mark, plays a dominant role in cases featuring a famous or strong mark," and paraphrases the court's holding as follows: "[f]amous marks are accorded more protection because they are more likely to be remembered and associated in the public mind than a weaker mark."⁴¹ However, the Kenner court does not state, as Opposer implies, that if the prior mark is demonstrated to be famous, that fame is dispositive in any analysis of likelihood of confusion under the *DuPont* factors. Rather, the court explained that a mark's fame merely serves to magnify the significance of any of the similarities that might exist between the marks being compared. In Kenner, unlike in the instant proceeding, the similarities between the marks were great.

The two marks at issue were Kenner's mark PLAY-DOH and the applicant, Rose Art's mark FUNDOUGH, both used for modeling compound. The court found in analyzing these marks that

PLAY and FUN, in the overall context of these competing marks, convey a very similar impression. Both are single syllable words associated

³⁹ See, e.g., Exhibits H and J to Bizzari Testimony and Bizzari Testimony at 124-132.

⁴⁰ Martanna does not concede that the NAUTICA mark is famous, except for the sake of argument.

⁴¹ Nautica Case Brief at 21.

closely in meaning. Particularly in the context of a child's toy, the concepts of fun and play tend to merge.⁴²

The court also observed that

[t]he single-syllable suffixes DOH and DOUGH sound the same. In light of a modern trend to simplify the spelling of "gh" words, consumers may even perceive one as an interchangeable abbreviation for the other,⁴³

and found that there were "dangers that consumers may receive the same commercial impression from both marks."⁴⁴

In contrast to Kenner, Opposer has failed to demonstrate that its mark NAUTICA is similar to Martanna's mark GET NAUTI with respect to any of the central elements in a likelihood of confusion analysis, first *DuPont* factor. As Applicant has demonstrated herein and throughout this proceeding, these marks look different, sound different, have different meanings (the applicant's meaning being conveyed by its different sound) and convey different commercial impressions. Consequently, even if the fame or strength of NAUTICA were to affect the Board's analysis by magnifying the insignificant, if any, degree of similarity that may exist between these two marks, the marks are so dissimilar that the first *DuPont* factor must still be considered dispositive in favor of Martanna.

This conclusion, that dissimilarity in other *DuPont* factors, particularly the first, can overcome a finding of fame, is supported by the Federal Circuit's decision in Burns Philp Food, Inc. v. Modern Products, Inc., 28 USPQ2d 1687 (Fed. Cir. 1993) ("Burns Philp Food"). In that case, the Court determined that the Board did not err in finding, after "giving great weight to the fame of the opposer's mark" that the marks SPICE ISLANDS and SPICE GARDEN, both for

⁴² Kenner at 354.

⁴³ Id. at 355.

⁴⁴ Id. (footnote omitted).

the identical product, spices, “were significantly different in sight, sound, appearance, meaning, connotation and commercial impression.”⁴⁵ Based on these differences, the Board had concluded that there was no likelihood of confusion. In upholding this conclusion, the Court stated the following:

[t]hat the fame of an opposer’s mark can sometimes be dispositive as in Kenner, 963 F.2d at 356, 22 USPQ2d at 1458, does not mean that other factors are not significant or may not outweigh fame [emphasis added]. Because the commercial impressions of the marks were found to be so different and because applicant’s mark with design as sought to be registered is so limited in shape, color and appearance, greatly reducing any likelihood of confusion in the marketplace, the finding of dissimilar commercial impressions is entitled to great weight. Indeed, on the particular facts of this case, we are not persuaded that the Board erred in its finding that the difference in commercial impression of the marks, along with the factors of dissimilar sight, sound, connotation and meaning, is significant enough to outweigh the fame of opposer’s mark [emphasis added].⁴⁶

In the instant proceeding as in Burns Philp Food, the first *DuPont* factor is dispositive and demonstrates that the likelihood of confusion between GET NAUTI and Opposer’s Marks is de minimis at best. This factor clearly outweighs the fame that Opposer claims for its NAUTICA mark.⁴⁷

In essence, Nautica contends that any mark which incorporates the letters NAUT or NAUTI – regardless of how or in what context it is used – is likely to confuse prospective

⁴⁵ Burns Philp Food at 1702.

⁴⁶ Id.

⁴⁷ See Kellogg, 951 F.2d at 332-333, 21 U.S.P.Q.2D at 1148 (holding that the Board considered the “preeminence of Kellogg in the cereal market and the large amounts Kellogg has spent on advertising and has collected in sales revenues,” and still justifiably concluded that the “substantial and undisputed differences in the ‘appearance, sound, connotation and commercial impression’” between Kellogg’s FROOT LOOPS and the applicant’s FROOTEE ICE mark warranted the grant of summary judgment that there was no likelihood that these marks’ “contemporaneous use by different parties will result in confusion.” The court stated explicitly that the Board correctly ruled that “a single DuPont factor – the dissimilarity of the marks -- was dispositive of the likelihood of confusion issue.”)

consumers into thinking that Nautica is the source of the relevant goods.⁴⁸ While the group of letters NAUT appears at the beginning of all of the marks Nautica cites in its opposition, and while the group of letters NAUTI appears at the beginning of all but one of these marks, the common prefix of Opposer's Marks is, in fact, the group of letters NAUTICA.⁴⁹ The letters NAUT or NAUTI are no more source-identifying prefixes for Nautica's Marks than the letters NA.

Clearly, Martanna's GET NAUTI Mark does not share the prefix NAUTICA with Nautica's Marks. Moreover, while GET NAUTI includes some of the same letters as Nautica's Marks, it uses those letters in a wholly different manner that creates a commercial impression that is unique and unrelated to that of any of Nautica's Marks. Nautica's reams of documentary evidence regarding the claimed fame of its mark fail to undermine the significance of the many and substantial differences between these marks in appearance, sound, connotation and meaning, which is the matter at the heart of this proceeding.

Considering the facts presented in this proceeding,⁵⁰ and while not discounting the weight that the Board should properly give to a famous mark, because Applicant's Mark GET NAUTI is so substantially different than any of Opposer's Marks, the first *DuPont* factor unquestionably favors Martanna and outweighs any of the other factors that might be in dispute or might weigh in Nautica's favor.⁵¹

⁴⁸ Opposer's Response Brief at 2 and 7.

⁴⁹ The fact that one mark (NAUTEX) out of the scores of marks that Nautica has cited in this proceeding does not include all of the letters NAUTICA cannot reasonably be said to affect this conclusion.

⁵⁰ "[E]ach case must be decided on its own facts." *DuPont*, 476 F.2d at 1361, 177 USPQ at 567.

⁵¹ Opposer argues that the Board should view several of the *DuPont* factors in its favor. However, "that evidence would be insufficient to show likelihood of confusion because 'the first *DuPont* factor simply outweighs all of the others which might be pertinent to this case.'" *Kellogg Co. v. Pack'Em Enterprises, Inc.*, 951 F.2d 330, 333, 21 USPQ2d 1142, 1146.

III. JUDGMENT SHOULD BE GRANTED IN FAVOR OF MARTANNA BECAUSE
OPPOSER HAS NOT ESTABLISHED ONE OF THE FUNDAMENTAL ELEMENTS
OF ITS DILUTION CLAIM

Opposer alleges that its mark NAUTICA has “become distinctive and famous, long prior to any date which may be claimed by Applicant”, and that registration of Martanna’s GET NAUTI Mark “will cause the dilution of the distinctive quality of Opposer’s Marks, all to Opposer’s irreparable damage.” (Opposition at ¶¶ 17 – 18). Nautica also asserts that the facts on the record of this proceeding “are clear and convincing evidence of the fame of Opposer’s NAUTICA Mark for purposes of a dilution claim under 15 USC §1125(c)(2)(A).”⁵² Assuming for purposes of argument that Opposer has demonstrated the fame of its NAUTICA mark, Martanna is nonetheless entitled to judgment on Opposer’s trademark dilution claim.

The relevant portion of the Trademark Dilution Revision Act of 2006 (the “Dilution Act”) provides that:

the owner of a famous mark that is distinctive ... shall be entitled to an injunction against another person who, at any time after the owner’s mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring . . . of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.

15 U.S.C. §1125(c)(1). While a finding of remediable dilution does not require a finding of actual or likely confusion, the Dilution Act makes clear that similarity between the famous mark and the alleged diluting mark is required.

The Dilution Act defines “dilution by blurring” as “association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark.” 15 U.S.C. §1125(c)(2)(B). In determining whether a mark or trade name is likely to cause dilution by blurring, the Dilution Act directs the Board to consider “all relevant factors,”

⁵² Nautica Case Brief at 29.

including the “degree of similarity between the mark or trade name and the famous mark.” 15 U.S.C. §1125(c)(2)(B)(i). And, with regard to the degree of similarity required to demonstrate likelihood of dilution, “the marks must at least be similar enough that a substantial segment of the target group of customers sees the two marks as essentially the same.” 4 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 24:117, at p. 24-329 (4th ed., 2007) (citation omitted). Further, “without identity or near identity, the injury of blurring is unlikely.” *Id.*

Indeed, the Board reiterated the central importance and distinct meaning of “similarity” in the context of dilution in its ruling on Nautica’s cross-motion for summary judgment in this proceeding:

with respect to the dilution claim, genuine issues remain, at least as to whether the parties’ marks would be considered substantially identical. 7-Eleven, Inc. v. Lawrence I. Wechsler, 83 USPQ2d 1715, 1729 (TTAB 2007) (“For purposes of dilution, a party must prove more than confusing similarity; it must show that marks are ‘identical or very substantially similar’”); Carefirst of Maryland Inc. v. FirstHealth of the Carolinas Inc., 77 USPQ2d 1492, 1514 (TTAB 2005); Toro Co. v. ToroHead, Inc., 61 USPQ2d 1164, 1183 (TTAB 2001).⁵³

For example, in the referenced case Toro Co. v. ToroHead, Inc., 61 USPQ2d 1164 (TTAB 2001), applicant sought registration of the mark “ToroMR” while opposer claimed this would dilute the distinctive quality of its “TORO” mark. *Id.*, at *3. Although the letters “toro” appeared in both marks, the Board did not find that the marks were essentially the same for purposes of dilution. *Id.*, at *67-68. The Board determined that the applicant’s mark “ToroMR”, with the added letters “MR” that did not appear in the opposer’s mark, changed the look and sound of the mark enough to preclude a finding of dilution. *Id.* In the instant case, as discussed *supra*, the

⁵³ Nautica Apparel, Inc. v. Martanna LLC, Opposition No. 91177192, Ruling Denying Cross-Motions for Summary Judgment (September 12, 2008) at 2 (footnote omitted).

differences in appearance and sound of the marks at issue, NAUTICA and GET NAUTI, are even more pronounced.

Despite the guidance provided by the Board in its September 2008 ruling, Nautica has not introduced any evidence or testimony in the record which demonstrates that its mark NAUTICA is “essentially the same,” “identical or substantially similar” to Martanna’s mark GET NAUTI. Instead, Nautica merely directs the Board to re-read the arguments it raised regarding similarity in the context of its likelihood of confusion argument.⁵⁴ As stated above, and as the Board has recognized, “similarity” for purposes of dilution is a different, higher standard than the “confusingly similar” standard applied in determining likelihood of confusion. Nautica clearly has not met this higher standard.

Martanna’s GET NAUTI Mark is not identical to Opposer’s NAUTICA mark. This is demonstrated by Martanna’s likelihood of confusion analysis under the first *DuPont* factor presented above and is incorporated herein. This analysis sets forth several bases on which Martanna’s GET NAUTI Mark and Opposer’s NAUTICA mark are substantially dissimilar – far from “near identity.” As a result, the commercial impression the GET NAUTI Mark conveys is so dissimilar from the commercial impression that Opposer’s NAUTICA Marks conveys that a consumer viewing Martanna’s GET NAUTI Mark would not “conjure up or call to mind” Opposer’s NAUTICA mark. 4 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 24:116, at p. 24 – 322 (4th ed., 2007). Martanna’s GET NAUTI Mark, therefore, is not sufficiently similar to Opposer’s NAUTICA mark to support a finding of likelihood of dilution, and judgment should be entered in favor of Martanna on this issue.

⁵⁴ Nautica Case Brief at 30.

IV. THE BOARD SHOULD DENY NAUTICA’S OBJECTION TO MARTANNA’S THIRD NOTICE OF RELIANCE

Nautica objected to the admissibility of Martanna’s Third Notice of Reliance, arguing that the three articles contained therein “are hearsay to the extent that Applicant seeks to rely on any statements made therein for the truth of any matter.”⁵⁵ Martanna, however, is not asserting the truth of any statement contained within the articles included in its Third Notice of Reliance.

Rather, Martanna identified the following as the three bases on which it relies on these articles. First, each article “demonstrates an example of the word “nauti” used in connection with a product sold in commerce in the United States, a book.”⁵⁶ Second, each article demonstrates an example “in which the word ‘nauti’ is used as a fanciful spelling of the word ‘naughty’, as it is in Applicant’s mark, GET NAUTI.” Third, because each of these articles “demonstrates an example in which the meaning of the word “nauti” is understood to be the same as that of the word ‘naughty’, as it is in Applicant’s mark, GET NAUTI.” Martanna has offered these articles for what they show on their face. Martanna did not offer these articles as evidence to prove the truth of the matters discussed therein, for example, the number of weeks that the book NAUTI DREAMS had appeared on the NEW YORK TIMES Best Sellers list.

The facts in the instant proceeding are distinguishable from those in the decision cited by Nautica, Corporacion Habanos, S.A. v. Anncas, Inc., 88 USPQ2d 1785 (TTAB 2008). In that case, the Board sustained an opposer’s objection to a testimony exhibit introduced by an applicant consisting of a copy of a magazine article. The Board determined that the exhibit was hearsay, explaining that “[s]tatements made by others in a magazine article are not admissible to

⁵⁵ Opposer’s Objections to Applicant’s Third Notice of Reliance and to Exhibit A-5 Introduced by Applicant During the Testimony Deposition of Opposer’s Witness, Margaret Bizzari (May 26, 2009) at 2.

⁵⁶ Nautica concedes that the three articles included in Martanna’s Third Notice of Reliance “are admissible” because they demonstrate that “in August of 2008 three publications mention a book or books with the term ‘NAUTI’ in the title.”

prove the truth of the matters,” and declined to consider the article in reaching its decision.⁵⁷

Moreover, the purposes for which Martanna offered its three articles are not based on “conjectures and/or presumptions” as Nautica asserts, any more so than the reams of articles Nautica submitted with its Second through Twenty-Third Notices of Reliance, from each of which Nautica asks the Board to find relevance to the following:

the renown and fame of Opposer’s trademarks and of Opposer and its services and products, use by Opposer of the mark and name NAUTICA, the goods and services marketed and sold by Opposer, the channels of trade through which Opposers goods and services are and have been, offered and sold, and the similarity of the parties’ respective marks, goods and services, and the legal similarity in channels of trade.

Following Nautica’s logic, in order to find that its articles are relevant for the reasons cited, the Board would need to either accept as truth the statements by others in certain of these articles -- e.g., that goods under the NAUTICA trademark are sold in particular channels of trade -- or make conjectures or presumptions to connect these articles to Nautica’s purposes -- *e.g.*, that articles that do not mention Martanna’s GET NAUTI Mark are somehow relevant to the alleged similarity between this mark and NAUTICA. For these reasons, we urge the Board to disregard Nautica’s objection as misplaced, and to consider these articles in reaching its decision.

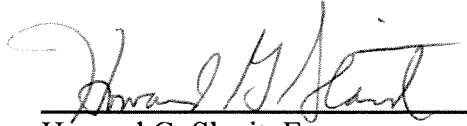
SUMMARY

Opposer’s likelihood of confusion claim fails because Applicant’s Mark is so dissimilar from any of Opposer’s Marks in appearance, sound, connotation and meaning, such that Applicant’s use of its Mark is unlikely to cause confusion, cause mistake, or to deceive, regardless of the degree of fame or strength the Board may attribute to Opposer’s Mark NAUTICA. In addition, Applicant’s Mark is so dissimilar from Opposer’s Mark NAUTICA that Opposer’s dilution claim must fail.

⁵⁷ Corporacion Habanos, S.A. v. Annecas, Inc., 88 USPQ2d 1785 (TTAB 2008) (emphasis added).

* * * * *

WHEREFORE, for the foregoing reasons, Applicant Martanna L.C. respectfully requests that judgment be granted in its favor that the Opposition be dismissed with prejudice.

A handwritten signature in cursive script, appearing to read "Howard G. Slavit", is written over a horizontal line.

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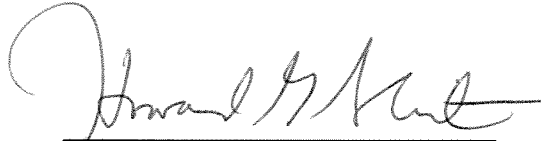
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

NAUTICA APPAREL, INC.,)	
)	
Opposer,)	Opposition No. 91177192
)	
v.)	Mark: GET NAUTI
)	
MARTANNA L.C.,)	Serial No. 78610037
)	
Applicant.)	Filed: April 15, 2005

CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of June, 2009, a true and correct copy of Applicant Martanna L.C.' s Brief on the case was served, via first-class United States mail postage prepaid, upon:

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